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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 592

ARTHUR RUSSELL HOWELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. RAYMOND GORDON,
Counsel for Petitioner.

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To the Honorable Judges of the Supreme Court of the United States:

I

Your petitioner, Arthur Russell Howell, respectfully represents unto your Honors that he has been and is aggrieved by the final judgment of the Court of Appeals for the Fourth Circuit, entered in the above entitled cause of action on the 24th day of January, 1949, and that he believes and alleges that there are grievous and numerous mistakes made in the rulings of the Court of Appeals for the Fourth Circuit therein.

II

The judgment of the said Circuit Court of Appeals is in direct contradiction and violates the principles of law laid down and held by other Circuit Courts of Appeals in the various circuits in the United States.

III

The said judgment is in direct violation of findings of this honorable court on similar points and propositions of law, and the same will disrupt and make unsafe and uncertain the right of persons accused of crime in any court of the United States.

IV

The said judgment of the said Circuit Court of Appeals herein is in direct violation of the Fifth and Sixth Amendments to the Constitution of the United States, and also to the Fourteenth Amendment and to the provisions thereof.

V

The judgment herein is unwarranted and unsupported by facts and circumstances. The Government of the United States offered no evidence, and we contend that the subsequent introduction of evidence by the plaintiff was sufficient to support our contention and to defeat the United States Government in the absence of evidence on the points raised herein, and for these and other facts and circumstances to be added, the petitioner alleges that he is entitled to a writ of certiorari to said judgment to correct the same.

VI

The facts and circumstances involved in this case are set out briefly and clearly in the plaintiff's brief, and are also easily found in the record, but a few of the facts we deem

necessary to call to the court's attention to now, are as follows:

VII

The defendant herein was convicted in the District Court for the Southern District of West Virginia in December of 1940 upon a charge of robbing a national bank, and was sentenced to serve twenty years in the Federal Penitentiary at Atlanta, Georgia. At the time he was tried, he was serving a sentence of ten years for a violation of the Federal Narcotic Act and was returned to West Virginia for trial and given a sentence of twenty years. Immediately thereafter he was recommitted to Leavenworth, Kansas, where he continued to serve the ten years sentence until it was satisfied, then he began serving the twenty years sentence given herein, and served a year and four months of said sentence. Application was made to the District Court of Kansas for the petitioner, and after long and lengthy proceedings, the petitioner alleged that he had been denied compulsory attendance of witnesses; that he had been denied a witness, whose name was Grace Wendell, who had been ordered transferred from Alderson, West Virginia, to Charleston, West Virginia, and he had secured a *duces tecum* and various other documents, including a prescription he had filled in Columbus, Ohio, on the 10th day of November, 1939, on the date of the bank robbery. Judge Melliot denied the writ and refused to discharge the defendant, but after considering the facts, he suggested to the petitioner that a new appeal would be sustained, and the petitioner contended that upon the trial of the case in Charleston, West Virginia, before the District Court, he was sentenced, without counsel, and the District Court of Kansas, on the authority of numerous cases decided by this Court, *Hawks* v. *Olsen,* 312 U. S. S. C. Rep. 119, and *Walker* v. *Johnson,* 312 U. S. Rep. 275, and numerous other

cases, found that the judgment of the District Court for the Southern District of West Virginia was void, and remanded the prisoner back to the District Court for the Southern District of West Virginia for further proceedings. Upon the return of the prisoner to the District Court for the Southern District of West Virginia, the petitioner, by his counsel, made a motion to set aside the verdict of the jury and award him a new trial, because he had been denied compulsory attendance of witnesses; that he had been tried without counsel, and that the United States had known that certain witnesses for the prosecution had identified other men for him, and that there was newly discovered evidence, to-wit: Three prescriptions that had been filled in Columbus, Ohio, for narcotics on the day of the robbery, and these were material and proper for his defense. The Court heard the evidence of the petitioner and refused to grant him a new trial, and sentenced him to serve the balance of the twenty year sentence. The United States Government offered no evidence herein and no denial of the contentions of the plaintiff, or petitioner. Petitioner takes the position that failure to file his answer or deny the motion or any testimony against the facts in the motion was testamentary to and did admit to all the truths alleged therein and set out.

VIII

Upon the trial of the above styled cause of action in the Circuit Court of Appeals for the Fourth Circuit, the Circuit Court did not take the view that the petitioner was too late to make the motion, as the rules now provide that newly discovered evidence must be revealed to the court and motion made to set aside the judgment within three years, but at the time the void judgment was rendered, the rule provided that a motion must be made in the following manner: In other words, the motion to set aside the verdict of the

jury came too late and gave life to a void judgment. The petitioner contended that the judgment rendered on the 3rd day of December, 1940, sentencing him to the penitentiary, having been set aside and held void by the District Court of Kansas, was void for the reason he had no counsel, and the record shows that it was a valid judgment, and it was an erroneous mistake, and this petitioner therefore prays that your Honors will grant unto the petitioner a writ of certiorari to the judgment of the Court of Appeals for the Fourth Circuit entered herein on the 24th day of January, 1948.

ARTHUR RUSSELL HOWELL,
By Counsel.

J. RAYMOND GORDON,
Attorney for Plaintiff.

BRIEF STATEMENT OF FACTS

The facts completely set forth in the plaintiff's brief filed in the Circuit Court of Appeals herein, and also in the petition for a writ of certiorari, counsel for the petitioner is of the opinion that the Court's attention should be called to the regular propositions the petitioner relies upon.

I

The petitioner contended that the judgment rendered in 1940 sentencing him to the penitentiary for twenty years was a void judgment, and that it was void because it violated the Fourteenth Amendments to the Constitution, the Fifth Amendment and the Sixth Amendment, and particularly because the petitioner had counsel for only a part of the trial of this case.

II

The petitioner contended that the after discovered evidence, that is, narcotic prescriptions filled in Columbus, Ohio, that were filled the day of the bank robbery, entitled him to a new trial, and

III

That he had been denied getting witnesses on the trial of the issues herein. The District Court did not feel that the Circuit Court of Appeals' opinion that the void judgment herein against him in 1940 could mark a deadline for the filing of this motion. The District Court never entertained any idea like that. That was an afterthought of Honorable John J. Parker of the Circuit Court of Appeals. The opinion also expresses the idea that we did not sufficiently prove that the defendant was without counsel. Now, in *Walker* v. *Johnson,* a leading case on similar questions, this Court held that when proceedings attacking a judgment in a criminal

case was made by the petitioner either prevailed or failed like in other law suits by the introduction of evidence, and that it was the duty of the United States to offer evidence or be defeated—that we were not placed beyond the impregnable wall of legal conclusion. If that be the rule, then the Circuit Court was in error on the main question in issue. We proved that the defendant, upon trial of the case, had no counsel in the introduction of the testimony, and the most important part of his case, the sentencing of him to the penitentiary, to which his own counsel at that time testified he did not recall whether they were there or not. The District Clerk was alive and well and in Charleston, the party who wrote this judgment. His chief deputy was still in office. The District Attorney was living and in this neighborhood, and we take the position that the Government failed to meet our contention. You will note from the paragraph in the written opinion herein, where a convict cannot be a witness in support of his case, and that makes me think of a solid year of black. How could a man prevail in court and how many times has the court held that he is a competent witness in his own behalf? These are some of the high points in this case. We contend the judgment herein denied the defendant a fair trial, denied him of compulsory attendance of witnesses and he being also tried without counsel, that the whole proceeding was a mere gesture and a shibboleth on the administration of justice. It is hard to say, how the fact that a man has passed three checks in a city two hundred miles away from a city in which a crime has been committed, at different hours in the day, could have been guilty of an offense such as this defendant is charged. This man is struggling for his life under the law, and our Federal Constitution is not based upon convenience for the court and the Government agencies, but is based upon the eternal principles of human life and justice and liberty upon which this

Government was founded and which we hope will always be its foundation.

It is submitted this writ should issue forthwith and that the judgment herein be corrected.

Respectfully submitted,

J. Raymond Gordon,
Counsel for Petitioner.

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